THE STATE
versus
PAUL CHINOMONA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 October 2019

Review Judgment

CHITAPI J: The regional magistrate for Eastern Division forwarded the record of proceedings following scrutiny of the trial proceedings conducted by the senior magistrate. The two magistrates did not agree on a point of law. The scrutinizing regional magistrate consequently seeks the judge's authoritative answer on the point of disagreement. I will revert to the legal point of departure in due course after setting out the background to the case.

The accused appeared before the senior magistrate on a charge of Theft of Trust Property as defined in s 113 (2) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. The brief facts of the case as set out in the State outline were that, the accused aged 21 years old and the complainant aged 23 years old both resided at different residences in Epworth suburb in Harare. The two were friends. The complainant owned a motor vehicle, a Toyota Ex-Salon. The accused borrowed the vehicle for his personal use on 23 December 2017. The complainant agreed to and lent the vehicle to the accused. The accused collected the vehicle at 12.00 noon. He was to return it on the same day by 8.00 p.m. The accused did not return the vehicle as promised. efforts made by the complainant to contact the accused by phone were in vain. The accused and the complainant next met within the Epworth area on 6 January 2017. The accused did not have the vehicle with him. This resulted in the complainant making a report to the police. The accused was consequently arrested and the vehicle was recovered.

Before the senior magistrate, the accused was charged as follows:

> "In that on 23 December 2017 and at Epworth, Paul Chinomona in violation of a trust agreement within Benjamin Pauro which required him to use a Toyota Ex-Salon motor vehicle registration number ACF 7863 and to hand it back to Benjamin Pauro on demand by Benjamin Pauro failed to hand over the motor vehicle or fail to account for the motor vehicle on demand by Benjamin Pauro."

The accused pleaded guilty to the charge. The senior magistrate recorded that he dealt with the matter in terms of s 271 (2) (b) of the Criminal Procedure & Evidence Act [*Chapter* 9:07]. The plea proceedings are recorded as follows in material part

"Facts **Read & Understood**

Q Are the facts correct

A Yes

Q Any variation

A No

Q Do you confirm that on 23 December 2017 you were at Epworth

A Yes

Q Do you confirm whilst there you drove a Toyota Ex–Saloon registration Number 7863

A Yes

Q Do you confirm that you had borrowed the vehicle

A Yes

Q Do you confirm according to agreement you were to return it after use

A Yes

Q You confirm that you then failed to hand over the vehicle upon demand

A Yes

Q Where is it

A It is in Inyanga. It had a breakdown

Q Did you have any lawful right to act in that manner

A No

Q Any defence to offer

A No

V **Guilty as pleaded"**

The accused was then sentenced to 6 months imprisonment. 3 months of that sentence was suspended for 5 years on condition of good behaviour and the remaining 3 months was suspended on condition that the accused performed community service of 105 hours.

The regional magistrate's query as contained in a minute to the trial magistrate was summoned up as follows in relation to the vehicle having broken down in Inyanga.

> "This matter was left at that without asking further whether he failed to return the vehicle as a result of the breakdown or he had appropriated it and never wanted to return it to the owner forever. This intention of the accused to deprive the complainant permanently of the vehicle did not come out clearly. It would appear the accused was offering an explanation of why he did not return the vehicle on time."

The regional magistrate enquired of the magistrate to comment on whether or not the senior magistrate should not have altered the accused's plea to not guilty."

The senior magistrate responded to the query in material part as follows:

> "…I am of the humble view that that (sic) as explained his intention was not of permanent deprivation but according to agreement, he was to return the vehicle after a certain period of time and failed to do so. Therefore, I am of the view that permanent deprivation is not an essential element of theft of trust property…"

In his minute to the Registrar for placement of the record of proceedings on review by a judge the regional magistrate summarised the issue as follows:

> "…Trust property is defined as follows according to s 112 "means property held whether under a deed of transfer by agreement or where an enactment or terms requiring the holder to do any or all of the following:
> (a) Hold the property on behalf of another person or account it to another person.
> (b) Hand the property over to a specific person
> (c) Deal with the property in a particular was…"
>
> The magistrate is mistaking theft of trust property as a unique offence which is different from the other theft. What differentiates the two is that the offence is stealing property already in his custody, unlike someone who dips his hand into the victim's hand and appropriates a wallet with valuables like personal effects as an example.
> The elements of the offence remain the same "for theft either way whether it involves appropriating trust property or the other theft. The difference being in the type of property stolen…"

The senior magistrate is misdirected on the law. The submission by the regional magistrate is also marginally correct. A close scrutiny of the provisions of the Criminal Law (Codification and Reform Act) clearly shows that s 112 is an interpretation section. It defines the meanings to be attributed to the words "property"; "steal"; "take"; "trust property" and "violence". The offence of theft which is the punishable crime is defined in s 113 which reads as follows:

113 Theft

(1) Any person who takes property capable of being stolen

(*a*) knowing that another person is entitled to own, possess or control the property or realising that there is a real risk or possibility that another person may be so entitled; and

(*b*) intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control; shall be guilty of theft and liable to either or both of the following

(i) a fine not exceeding level fourteen or twice the value of the stolen property, whichever is the greater; or

(ii) imprisonment for a period not exceeding twenty-five years; or both:

Provided that a court may suspend the whole or any part of a sentence of imprisonment imposed for theft on condition that the convicted person restores any property stolen by him or her to the person deprived of it or compensates such person for its loss.

(2) Subject to subsection (3), a person shall also be guilty of theft if he or she holds trust property and, in breach of the terms under which it is so held, he or she intentionally

(*a*) omits to account or accounts incorrectly for the property; or

(*b*) hands the property or part of it over to a person other than the person to whom he or she is obliged to hand it over; or

(*c*) uses the property or part of it for a purpose other than the purpose for which he or she is obliged to use it; or

(*d*) converts the property or part of it to his or her own use.

(3) Subsection (2) shall not apply if

(*a*) the person holding or receiving the property has properly and transparently accounted for the property in accordance with the terms of the trust; or

(*b*) the person disposing of the property retains the equivalent value thereof for delivery to the person entitled thereto, unless the terms under which he or she holds or receives the property require him or her to hold and deliver back the specific property.

(4) For the avoidance of doubt it is declared that where a person, by means of a misrepresentation as defined in section *one hundred and thirty-five*, takes any property capable of being stolen, intending to deprive another person of the ownership, possession or control of the property, the competent charge is fraud and not theft."

The provisions of s 113 (1) (a) and (b) are conjunctive and consist in the accused having knowledge, actual or constructive, that another person is entitled to own, possess or control the property in issue and taking such property intending to permanently deprive the owner, possessor or controller/ custodian of the property. The intention to permanently deprive can either be actual or constructive. As the regional magistrate properly pointed out, with theft generally, the property which the accused steals would be in the custody, control, possession or under the ownership of another. In short, the accused would not be the one holding the property in his possession or control. He would also not be the owner. The accused takes away from another and in the result

steals or commits a theft. It must always be noted that theft is a crime of intention, actual or constructive.

On the other hand, or by contract s 113 (2) creates a different species of theft. It creates an offence called theft of trust property. Trust property is defined in s 112. It is that property as defined whose taking is criminalized. The accused must act intentionally in committing any of the acts mentioned in para (a), (b), (c) or (d) of subs 2 of s 113. Section 113 (2) provides that the accused who commits the acts listed "shall also be guilty of theft…" Since theft is defined as encompassing intention to permanently deprive another person, the aspect of permanent deprivation is deemed or inferred to be included because of the verdict which is supposed to be retained. In other words, if an accused person intentionally commits the listed acts in s 113 (2) (a) – (d) such accused is guilty of theft. If one then asked the question, "what is the meaning of theft?" one goes back to s 112. The elements of theft will thus be deemed satisfied where one commits any of the 4 acts listed in s 113 (2) (a – d).

It must follow from the above that where the accused commits any of the 4 acts as aforesaid, there is no legal requirement to ask the accused whether he or she intended to permanently deprive anyone of the trust property held. This is so because once the offence or conduct is shown to have been intentionally committed, theft is the correct verdict. Theft is as noted explicitly defined. The provision is further not ambiguous. It provides that the person "…shall also be guilty of theft if he or she holds trust property and in breach of the terms under which it is so held, he or she intentionally…" if the person is guilty of theft then that is it. There is no need for the court to again go through the elements of theft.

The above expose does not however fully answer the point of departure between the senior and regional magistrates. The senior magistrate was wrong to hold that permanent deprivation is not an essential element of the offence of theft of trust property. The correct position is that intention of permanent deprivation does not have to be separately proven. It is inferred because of the nature of the verdict which the court retains. The State only needs to prove intentional commission of any of the 4 acts done in breach of the terms under which the property is held. If such proof is proferred, the offence of theft is deemed proven. If this is what the senior magistrate intended to convey by stating that permanent deprivation is not an essential element of the senior magistrate theft of trust property, then the senior magistrate was correct. I am here assuming that

what he or she meant was that it was not necessary to canvass the issue of permanent deprivation as a separate essential element.

I however agree with the regional magistrate that the accused raised a possible plausible and competent defence which ought to have been investigated. If indeed the motor vehicle broke down and was immobile, then the accused could not be held to have intentionally abrogated the trust duty to return the vehicle. The accused in effect raised the defence of impossibility. It is a defence provided for in s 261 of the Criminal Law Codification and Reform Act which provides as follows:

> "**261 Requirements for impossibility to be complete defence**
> (1) Where a person is accused of a crime of which an essential element consists of a failure, omission or refusal to do anything, the fact that it was physically impossible for the accused to do that thing shall be a complete defence to the charge if—
> (*a*) the impossibility was absolute, that is to say, if it was objectively impossible for anyone in the accused's position to have done that thing; and
> (*b*) the impossibility was not due to the accused's own fault.
> (2) For the purposes of subsection (1), the fact that it is extremely difficult for a person to do a thing shall not constitute impossibility.
> (3) This section shall not prevent a court, when imposing sentence upon a convicted person, from taking due account of any difficulty experienced by him or her in complying with a law."

The senior magistrate should have altered the plea to not guilty and required the State to disprove the defence proferred by the accused as false beyond a reasonable doubt. It was a misdirection to ignore the accused's explanation for failure to return the vehicle as promised on borrowing it.

I also need to draw the attention of the senior magistrate and perhaps equally the regional magistrate to the provisions of s 119 of the Criminal Law (Codification and Reform) Act. The provisions of the section list unavailable defences to a charge of theft including theft of trust property. For the avoidance of doubt, s 119 provides as follows:

> "**119 Unavailable defences to charge of theft, stock theft or unauthorised borrowing or use of property**
> (1) It shall not be a defence to a charge of theft, stock theft or unauthorised borrowing or use of property that the person charged—
> (*a*) took the property concerned in circumstances other than those described in subsection (1) of section *one hundred and eighteen*, genuinely but mistakenly believing—
> (i) that he or she had a legal right to take the property on his or her own behalf or on behalf of someone else; and
> (ii) in the case of a charge of theft, that he or she had a legal right permanently to deprive the person from whom he or she took the property of his or her ownership, possession or control of it;
> Or
> (*b*) did not intend to gain any personal benefit from the property concerned; or

(*c*) needed the property concerned because he or she was suffering hardship; or
(*d*) believed that the person entitled to own, possess or control the property had more property than he or she needed for his or her own purposes; or
(*e*) did not intend to prejudice the person entitled to own, possess or control the property; or
(*f*) in the case of a charge of theft or stock theft, intended to return the property to the person entitled to own, possess or control it, having originally taken it with the intention of permanently depriving that person of his or her ownership, possession or control; or
(*g*) did not know the identity of the person entitled to own, possess or control the property.
(2) Where a person holds trust property it shall not be a defence to a charge of theft, stock theft or unlawful borrowing or use of the property that the person genuinely but mistakenly believed that the law, in the absence of an express stipulation to the contrary under the terms on which he or she holds the property, allowed him or her to spend, consume or dispose of that property provided that he or she replaced it.
(3) A court may regard the factors referred to in paragraphs (*a*), (*b*), (*c*) and (*e*) of subsection (1), and subsection (2), as mitigatory when assessing the sentence to be imposed upon a person convicted of theft, stock theft or unauthorised borrowing or use of property."

If the possible defence which the accused raised had fallen into any of the exceptions as listed in s 119, I would not have interfered with the conviction and ensuing sentence.

I conclude however by holding that the proceedings cannot be said to pass the real and substantial justice test because the accused was wrongly convicted when he had raised a defence which needed to be interrogated and a decision made as to whether it exonerated his conduct. Unfortunately, the accused would have served his community service by now. The regional magistrate suggested that I quash the conviction and sentence and remit the case to the senior magistrate to deal with the case on full trial. In view of the position taken by the senior magistrate and his or her strong convictions on the correctness of the decision which was reached, it would not be fair or justiciable to order that a trial be conducted before the same magistrate. Further, in view of the fact that this review has become academic since the accused served the sentence, a just and appropriate course to adopt is to quash the conviction and sentence and leave it to the Prosecution General to decide whether or not to mount a fresh prosecution.

I therefore issue the following order –

(a) The conviction and sentence is hereby quashed and set aside.

(b) The decision to prosecute the accused afresh is left to the Prosecutor General.

(c) Should the Prosecutor General decide to prosecute the accused afresh –

(i) the accused shall be tried before a different magistrate.

(ii) the accused shall not be sentenced to any punishment greater than what the accused was initially sentenced to and the court shall take into account the sentence already served.

CHIRAWU-MUGOMBA J agrees ……